Dismissed v. Everest Scaffolding Only 9/22/2014

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X

JOSE CARLOS DASILVA

Index No. **308964/2010**

Plaintiff,

DECISION/ORDER

-against-

STRUCTURAL PRESEVATION SYSTEMS, LLC., ASN ROOSEVELT CENTER LLC., ARCHSTONE COMMUNITIES ARCHSTONE-SMITH COMMUNITIES, LLC., EVEREST SCAFFOLDING, INC.

Present:
HON. KENNETH L. THOMPSON

Defendants X

STRUCTURAL PRESERVATION SYSTEMS, LLC,

Third Party
Index No. : 83732/2011

Third-Party Plaintiff,

-against-

GREENLINE INDUSTRIES, INC.,

Third-Party Defendant.

X

The following papers numbered 1-**11** read on this motion, **Summary Judgment**____

No On Calendar of **MAY 8, 2014**	PAPERS NUMBERED
Notice of Motion-Order to Show Cause- Exhibits and Affidavits Annexed	**1, 5**
Answering Affidavit and Exhibits	**2, 3, 7, 8**
Replying Affidavit and Exhibits	**4, 10, 11**
Affidavit	
Pleadings—Exhibits	
Memorandum of Law	**6, 9**
Stipulation—Referee's Report—Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Plaintiff moves pursuant to CPLR 3212 for partial summary judgment on liability against Structural Preservation Systems, LLC, (SPS), ASN Roosevelt Center LLC, Archstone Communities and Archstone-Smith Communities, LLC, (collectively, owners), on grounds of violation of Labor Law 240 and 241(6). Defendant, Everest Scaffolding, Inc., (Everest), cross-moves pursuant to CPLR 3212 to dismiss the complaint and all cross-claims as against it. This action arose as a result of personal injuries sustained by plaintiff when he fell from a scaffold.

The scaffold was erected by Everest Scaffolding, Inc., pursuant to a contract with the general contractor, SPS. ASN Roosevelt Center LLC, Archstone Communities and Archstone-Smith Communities, LLC, were the owners of the pertinent buildings whose exteriors were being renovated.

LABOR LAW 240(1)

"All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." Labor Law 240(1).

"It is well established that the duty imposed by Labor law§240(1) is nondelegable, and, consequently, an owner and/or contractor who breaches that duty may be held liable in damages regardless of whether it actually exercised supervision or control over the work (*Ross v Curtis-palmer Hydro-Elec. Co.*, 81 NY2d 494, 500; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513) and regardless of whether the worker's negligence contributed to the mishap (*Rocovich v Consolidated Edison Co., supra*, at 513; *Bland v Manocherian*, 66 NY2d 452, 459-461)." *Cosban v New York City Transit Authority*, 227 AD2d 160, 160-161 (1st Dept 1996).

It is undisputed that plaintiff fell from the scaffold while he was perched on

the scaffold frame doing overhead work. Plaintiff avers that he fell when the wind blew and shook the scaffold. The work he was performing was higher up than could be reached from standing on the wooden planks. It was undisputed that plaintiff was directed to remove sheets of plastic that was placed around the building to protect the building during a storm.

Defendants argue that plaintiff is the sole proximate cause of his injuries.

> Liability under section 240 (1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff's own negligence is the sole proximate cause of his injury (see *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]).
>
> *(Gallagher v New York Post*, 14 N.Y.3d 83, 88 [2010]).

However, in the case at bar, plaintiff was told to remove the plastic as quickly as possible so the carpenters could begin the work. It is further undisputed that workers climbed on the framing of the scaffold in view of the SPS' foreman Michael Lawrence, (Lawrence). (Plaintiff's transcript, p. 153; Lawrence, p. 149; Gomes p. 58).

"The sole proximate cause defense generally applies where the worker misused, removed, or failed to use an available safety device that would have prevented the accident, or knowingly chose to use an inadequate device despite the availability of an adequate device (see *Robinson v East Med. Ctr., LP*, 6 NY3d

550, 554 [2006]). However, "[t]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence" (*Kielar v Metropolitan Museum of Art,* 55 AD3d 456, 458 [1st Dept 2008] [internal quotation marks omitted]) and "contributory negligence . . . is not a defense to a section 240 (1) claim" (*Ernish v City of New York*, 2 AD3d 256, 257 [1st Dept 2003])." *Boyd v Schiavone Constr. Co., Inc.,* 106 A.D.3d 546, 548 [1st Dept 2013].

Accordingly, plaintiff's motion is granted on grounds of a violation of Labor Law 240(1). The alternate grounds for summary judgment, violations of Labor Law 241(6) is moot.

Cross-motion of Everest Scaffolding

There is no opposition to the dismissal of the Labor Law claims as against Everest. With respect to claims of common law negligence, Everest was merely responsible for the erecting and dismantling of scaffolding. Everest did not supervise the workers at the day to day work site and did not supervise plaintiff. Everest was not present at the worksite.

Both plaintiff's co-worker, Gomes, and the SPS foreman, Lawrence, testified that parts of the scaffold were removed to perform work. Gomes testified that when parts of the scaffold were removed, the scaffold became less stable. SPS was responsible for daily inspections to "make sure that everything was intact. If there was anything that was removed, that it was replaced, and the scaffold was

100% safe at all times." (SPS/Lawrence p. 54). There is no evidence that the scaffold as erected was defective. There is no evidence of Everest's negligence.

With respect to the cross-claims for common law indemnification:

> [I]n the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law, such as the nondelegable duty imposed by Labor Law § 240 (1) (see, *McDermott v City of New York*, 50 NY2d 211).

(*Correia v Professional Data Mgt.*, 259 A.D.2d 60, 65 [1st Dept 1999]).

As held above, there is no evidence of any negligence on the part of Everest. Therefore, common law indemnification claims against Everest must be dismissed.

As for contractual indemnification, the First Department fully addresses nearly the same pertinent facts present in the case at bar and very similar contractual language in *Brown v Two Exch. Plaza Partners*, 76 NY2d 172 [1990]).

"Our decision in *Brown v Two Exch. Plaza Partn*ers (146 AD2d 129 [1989], affd 76 NY2d 172 [1990]) is also distinguishable. The plaintiff in Brown was injured by the unexplained collapse of a scaffold erected by a subcontractor, Heydt, for the use of all the trades involved in the construction project, pursuant to a subcontract with the general contractor, Fuller. An indemnity clause required Heydt to indemnify Fuller against personal injury " 'arising out of, in connection with or as a consequence of the performance of the [subcontractor's] Work and/or any act or omission of the Subcontractor or any of its subcontractors . . . as it

relates to the scope of this Contract' " (id. at 133-134). The scaffold collapsed, however, one week after it was inspected and accepted by Fuller, which was to control its use and maintain it following its acceptance. Although Heydt had moved or straightened the scaffold some four days prior to its collapse, we rejected Fuller's contention that the accident arose out of, was in connection with or was a consequence of Heydt's erection or straightening of the scaffold. To accept that contention, "without any showing of a particular act or omission in the performance of such work causally related to the accident, would be to make Heydt a virtual insurer of the scaffold. Heydt would be responsible for an unexplained collapse of the scaffold at a time when it had no control over its use or responsibility for its maintenance, and, as contemplated by its contract with Fuller, was not even present at the site" (id. at 136)." *Urbina v 26 Ct. St. Assoc., LLC,* 46 A.D.3d 268, 273-274 (1st Dept 2007]).

In the case at bar, as in Brown, there is no "showing of a particular act or omission in the performance of such work [Everest's work], causally related to the accident."

Accordingly, plaintiff's motion is granted to the extent that Structural Preservation Systems, LLC, ASN Roosevelt Center LLC, Archstone Communities and Archstone-Smith Communities, LLC are held to be liable for the injuries sustained by plaintiff under Labor Law 240(1). The cross-motion of Everest

Scaffolding, Inc., is granted in its entirety. The complaint and all cross-claims are hereby dismissed as against Everest Scaffolding, Inc., only.

The foregoing shall constitute the decision and order of this Court.

Dated: SEP 18 2014

KENNETH L. THOMPSON JR. J.S.C.